No. ___ (1) Supreme Court, U.S.
FILED

04 417 SEP 23 2004

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BILL HEARD CHEVROLET, INC.-PLANT CITY,
Petitioner,

- v.

RANDAL S. BRAGG, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

GARY L. SASSO *
CHRIS S. COUTROULIS
D. MATTHEW ALLEN
JOSEPH H. LANG, JR.
CARLTON FIELDS, P.A.
Corporate Center Three at
International Plaza
4221 W. Boy Scout Boulevard
Tampa, Florida 33607-5736
(813) 223-7000

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a creditor must satisfy disclosure obligations under the Truth in Lending Act with respect to a conditional credit transaction to which the consumer was not contractually obligated under state law when applicable regulations of the Federal Reserve Board require only that the creditor "shall make disclosures before *consummation* of the transaction," defined to be "the time that a consumer becomes *contractually obligated* on a credit transaction," and Staff Commentary provides that *state law* should govern when the consumer becomes contractually obligated to a credit transaction.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below were Randal Bragg, Robert Crabtree, Christopher E. Nichols, Bond Nichols, Nonie Stebbins, Andre Reichert, Donald E. Stebbins, John E. Cone, Bill Heard Chevrolet, Inc.-Plant City, Affiliated Financial Corporation, Triad Financial Corporation, and WFS Financial, Inc. Petitioner Bill Heard Chevrolet, Inc.-Plant City states, pursuant to Supreme Court Rule 29.6, that its parent corporation is Bill Heard Enterprises.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDINGS	ii
TABLE OF AUTHORITIES	iv
OPINIONS AND JUDGMENTS BELOW	1
JURISDICTIONAL STATEMENT	1
STATUTE, REGULATIONS, AND STAFF COMMENTARY INVOLVED	2
STATEMENT	3
A. Statutory Background	3
B. Proceedings Below	5
REASONS FOR GRANTING THE WRIT	10
THE ELEVENTH CIRCUIT'S DISREGARD FOR FLORIDA STATE CONTRACT LAW, IN THE FACE OF STAFF COMMENTARY DETERMINING THAT THE QUESTION WHEN CONSUMMATION OF A CREDIT TRANSACTION OCCURS IS CONTROLLED BY STATE LAW, CREATES A CONFLICT WITH THIS COURT'S RULING IN *FORD MOTOR CREDIT CO. V. MILHOLLIN*, 444 U.S. 555 (1980) THAT "UNLESS DEMONSTRABLY IRRATIONAL, FEDERAL RESERVE BOARD STAFF OPINIONS CONSTRUING THE ACT OR REGULATION SHOULD BE DISPOSITIVE . . . ."	10
CONCLUSION	17

TABLE OF AUTHORITIES

CASES — Page

Bragg v. Bill Heard Chevrolet, Inc.-Plant City, 245 F. Supp. 2d 1235 (M.D. Fla. 2003) 2, 8, 12
Bragg v. Bill Heard Chevrolet, Inc.-Plant City, 374 F.3d 1060 (11th Cir. 2004) ..... *passim*
Cody v. Cmty Loan Corp. of Richmond County, 606 F.2d 499 (5th Cir. 1979) 9
Ford Motor Credit Co. v. Milhollin, 444 U.S. 555 (1980) ..... *passim*
Huskamp Motor Co. v. Hebden, 104 So. 2d 96 (Fla. 3d DCA 1958) 12
Nigh v. Koons Buick Pontiac GMC, Inc., 319 F.3d 119 (4th Cir. 2003), pending before this Court as Case No. 03-377 ..... 14, 15, 16
Zoumayaiwan v. Jack Haggerty Olds, Inc., 1985 WL. 1453 (N.D. Ill. May 22, 1985) 16

STATUTES AND MISCELLANEOUS MATERIALS

15 U.S.C. § 1601 *et seq.* ..... *passim*
15 U.S.C. § 1638(b)(1) 2, 4, 11
15 U.S.C. § 1640(a)(2) 14
28 U.S.C. § 1254(1) 2
12 C.F.R. § 226.17 ..... 2, 4, 11
12 C.F.R. § 226.2(a) 3
12 C.F.R. § 226.2(kk) (1982) 4, 5
12 C.F.R. § 226, Official Staff Commentary 2(a)(13) ..... *passim*
46 Fed. Reg. 20848, 20851 (Apr. 7, 1981) 4-5, 17

IN THE

Supreme Court of the United States

No. ___

BILL HEARD CHEVROLET, INC.-PLANT CITY,
Petitioner,

v.

RANDAL S. BRAGG, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Bill Heard Chevrolet, Inc.-Plant City ("Bill Heard Chevrolet"), petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS AND JUDGMENTS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit was issued on June 25, 2004 and is reported at 374 F.3d 1060 (11th Cir. 2004) (Pet. App. 1a-14a). This petition was timely filed on September 23, 2004.

The Order of the United States District Court for the Middle District of Florida granting in part Bill Heard Chevrolet motion to dismiss was issued on January 24, 2003 and is unreported (Pet. App. 22a-36a). The Order of the

district court denying Plaintiffs' motion for rehearing was issued February 14, 2003 and is reported at 245 F. Supp. 2d 1235 (M.D. Fla. 2003) (Pet. App. 15a-21a).

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Eleventh Circuit was issued on June 25, 2004. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE, REGULATIONS, AND STAFF COMMENTARY INVOLVED

Section 1638(b)(1) of the Truth in Lending Act (TILA), 15 U.S.C. § 1638(b)(1), provides that:

> (b) Form and timing of disclosures; residential mortgage transaction requirements (1) Except as otherwise provided in this part, the disclosures required under subsection (a) of this section shall be made before the credit is extended. Except for the disclosures required by subsection (a)(1) of this section, all disclosures required under subsection (a) of this section and any disclosure provided for in subsection (b), (c), or (d) of section 1605 of this title shall be conspicuously segregated from all other terms, data, or information provided in connection with a transaction, including any computations or itemization.

12 C.F.R. § 226.17 reads, in pertinent part, as follows:

> (b) Time of disclosures. The creditor shall make disclosures before consummation of the transaction. In certain residential mortgage transactions, special timing requirements are set forth in Sec. 226.19(a). In certain variable-rate transactions, special timing requirements for variable-rate disclosures are set forth in Sec. 226.19(b) and Sec. 226.20(c). In certain transactions involving mail or telephone orders or a series of sales, the timing of disclosures may be delayed in accordance with paragraphs (g) and (h) of this section.

12 C.F.R. § 226.2(a) reads, in pertinent part, as follows:

> (13) Consummation means the time that a consumer becomes contractually obligated on a credit transaction.

12 C.F.R. § 226, Official Staff Commentary 2(a)(13) provides:

> 1. State law governs. When a contractual obligation on the consumer's part is created is a matter to be determined under applicable law. Regulation Z does not make this determination. A contractual commitment agreement, for example, that under applicable law binds the consumer to the credit terms would be consummation. Consummation, however, does not occur merely because the consumer has made some financial investment in the transaction (for example, by paying a nonrefundable fee) unless, of course, applicable law holds otherwise.
>
> 2. Credit v. sale. Consummation does not occur when the consumer becomes contractually committed to a sale transaction, unless the consumer also becomes legally obligated to accept a particular credit arrangement. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a purchase contract may also be created, but consummation for purposes of the regulation does not occur unless the consumer also contracts for financing at that time.

STATEMENT

A. Statutory Background

Congress enacted the Truth in Lending Act (TILA) in 1968, Consumer Credit Protection Act, Pub. L. No. 90-321, 82 Stat. 146 (1968) (codified as amended at 15 U.S.C. § 1601 *et seq.*), to address concerns about deceptive credit practices. TILA is a consumer protection statute designed to protect consumers from contracting for financing without proper

disclosure of fees, rates, and other information. *See* 15 U.S.C. § 1601, *et seq.* TILA's purpose is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit . . . ." 15 U.S.C. § 1601(a).

Although TILA applies to a broad range of consumer credit transactions, the statute's disclosure obligations arise only in discrete circumstances. Under TILA, the obligation to make the required disclosures applies "before the credit is extended." 15 U.S.C. § 1638(b)(1). This statement has been illuminated by Regulation Z, which was adopted by the Federal Reserve Board in support of TILA. 12 C.F.R. § 226. Regulation Z states that "[t]he creditor shall make disclo sures before consummation of the transaction." 12 C.F.R. § 226.17. Consummation is defined by Regulation Z as follows: "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). The Official Staff Commentary to that definition explains that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13).

In contrast to the current definition of consummation under TILA and Regulation Z, the definition of consummation prior to 1982 was starkly different. Previous staff interpretations had acknowledged an economic coercion test, whereas the new Regulation Z focused upon the time at which a consumer becomes contractually obligated on a credit transaction. Under the prior version of Regulation Z, consummation was defined as the time "when a creditor agrees to extend credit and the customer agrees to utilize that credit." 12 C.F.R. § 226.2 (kk)(1982). The current definition of consummation has been characterized as a "significant departure" from the staff interpretations of the previous definition. 46 Fed. Reg.

20848, 20851 (Apr. 7, 1981). When issuing the new Regulation Z, the Federal Reserve Board explained as follows:

> Consummation. This definition is based on § 226.2(kk) of the current regulation, which defines consummation in terms of the creation of a contractual relationship, and is the same as that in the December proposal. As before, state law determines when the contractual obligation arises, but the revised definition focuses on when the consumer becomes obligated.
>
> This definition is a significant departure from long-standing staff interpretations of the current regulation that had added the concept of "economic coercion" to the test of when consummation occurs. Under the revised definition, consummation occurs only when the consumer becomes contractually obligated on the credit transaction. The time at which a consumer becomes contractually obligated on a purchase does not determine when consummation occurs for Truth in Lending purposes, as long as there is no credit obligation. For example, when a consumer pays a nonrefundable deposit to purchase an automobile, a sales contract may have arisen. However, consummation for Truth in Lending purposes does not occur unless the consumer also contracts for financing at that time.

Id.

B. Proceedings Below

Facts

On September 28, 2001, Randal Bragg ("Mr. Bragg") signed various documents related to his potential purchase of a 2002 Silverado truck. 374 F.3d at 1062. He executed a standard purchase agreement, providing that Bill Heard Chevrolet retained title pending credit approval. *Id.* at 1063. The purchase agreement expressly provided that "Seller agrees to sell the designated vehicle only under the terms and conditions herein set forth, and agreed to by Purchaser,

provided however, the designated financial institution approves Purchaser's application for a loan equal to the amount of a note to be executed by Purchaser." R-38-Exh. A-1. It further provided that, "neither party hereto shall be bound to the other until terms of credit have been approved by both parties." R-38-Exh. A-1.

At the same time, Mr. Bragg executed a bailment agreement that enabled him to take possession of the truck before the transaction was consummated. R-38-Exh. A-4. Under the bailment agreement, if financing was not obtained, the consumer had no purchase obligation and instead owed Bill Heard Chevrolet twenty cents per mile for "excessive mileage and use" (when mileage exceeds twenty miles per day) and for any damages to the vehicle. R-38-Exh. A-4. If financing were approved and the consumer received title to the truck, he would not be responsible for the rental fees under the bailment agreement that might otherwise be applicable. R-38-Exh. A-4. The bailment agreement expressly provided that the transaction was not complete unless Bill Heard Chevrolet "is able to provide Buyer(s) with financing according to the terms of the Sales Agreement . . . ." R-38-Exh. A-4.

Finally, Mr. Bragg signed two Florida Simple Interest Vehicle Retail Installment Sales Contracts. Each related to the same vehicle, but each contained a different rate of financing. One contained an annual percentage rate ("APR") of 14.50% and the other contained an APR of 14.65%. R-38-Exhs. A-3, A-4.

On October 1, 2001, Bill Heard Chevrolet contacted Mr. Bragg and notified him that it had been unable to obtain financing approval on the terms set forth in either of the Installment Sales Contracts he had signed but that other financing could be arranged. *See* 374 F.3d at 1062. Mr. Bragg then signed two new Installment Sales Contracts, agreeing that their effective date would be September 28, 2001, which

was the day he took delivery of his 2002 Silverado truck. *Id.* The new agreements differed from each other only with respect to the amount financed; Mr. Bragg purchased an extended service plan in one of the transactions, which increased the amount financed in one of the new Installment Sales Contracts. *Id.* The APR was the same in both. *Id.* Financing approval was obtained on October 5, 2001. *Id.*

Course of the Proceedings

Mr. Bragg brought suit alleging that Bill Heard Chevrolet violated TILA by failing to make statutory disclosures with respect to the initial two Installment Sales Contracts for which financing was never approved, and with respect to the Installment Sales Contract for which financing was approved. Significantly, the district court rejected Mr. Bragg's claims with respect to the final and indisputably consummated transaction, and that is not at issue at this time (that ruling also rejects any TILA claim as to the third Installment Sales Contract). What is at issue is whether Mr. Bragg stated a claim for TILA violations for the two Installment Sales Contracts plainly superceded by the final, consummated transaction.

The district court held that plaintiff did not state a claim with respect to the superceded transactions. Following the applicable regulations and the Official Staff Commentary interpreting those regulations, the district court looked to state law to determine whether Mr. Bragg had become contractually obligated under the documents he signed to go forward with the two, conditional Installment Sales Contracts. The district court concluded that, under Florida law, Mr. Bragg was not contractually bound to proceed on those terms. He was free to return the truck and abandon the transaction. Accordingly, the time had not passed by which Bill Heard was required under TILA to make appropriate disclosures, and it would not have violated TILA by failing to do so.

Based on this conclusion, the district court dismissed Mr. Bragg's complaint. The dismissal order provides in part:

> Defendant Bill Heard argues in its Motion to Dismiss that no TILA cause of action exists because Mr. Bragg and Crabtree never consummated a transaction with Bill Heard in which an alleged TILA violation occurred. In response, Mr. Bragg and Crabtree argue that a transaction was consummated for TILA purposes every time Mr. Bragg or Crabtree signed a purchase agreement or [Installment Sales Contract] regardless whether the purchase became completed. After careful consideration, this Court concludes that neither Mr. Bragg nor Crabtree consummated a transaction that contained an alleged TILA violation, and Bill Heard's Motion to Dismiss Plaintiffs' TILA claims should be granted.

(Pet. App. 28a).

Mr. Bragg filed a motion for rehearing, which the district court denied. 245 F. Supp. 2d 1235 (M.D. Fla. 2003). Mr. Bragg then appealed his case to the Eleventh Circuit.

The Eleventh Circuit reversed. 374 F.3d 1060 (11th Cir. 2004). In doing so, the Eleventh Circuit acknowledged that the Official Staff Commentary to Regulation Z says that state law should determine the point at which a consumer becomes contractually obligated to a credit agreement. Nevertheless, the Eleventh Circuit wrote:

> The specific content and timing of the disclosures are set forth in Regulation Z, which was adopted by the Federal Reserve Board in support of TILA. Regulation Z requires that the creditor disclose the identity of the creditor, the amount being financed, the annual percentage rate, the total sale price, and the total amount of payment. These disclosures must be made "before credit is extended," a point known as "consummation." "'Consummation' means the time that a consumer be comes contractually obligated on a credit transaction." We evaluate TILA transactions from the consumer's viewpoint.

> Regulation Z also provides that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. However, "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes"; that question is governed by federal law. [*Cody v. Cmty Loan Corp. of Richmond County*, 606 F.2d 499, 505 (5th Cir. 1979).][1]

374 F.3d at 1065-66. Thus, disregarding how Florida law would treat the transaction for purposes of determining the point at which a consumer becomes contractually obligated to a credit agreement, the Eleventh Circuit concluded by holding:

> Regardless of "the degree of commitment of the lender" contained in the agreements' condition precedent, Bragg's signature on these documents rendered him contractually obligated to the purchase of credit and thus constituted consummation for purposes of TILA disclosures. To give full effect to TILA's goal of providing meaningful and timely disclosure of important credit terms, we hold that in a financing agreement containing a condition precedent where the condition of obtaining financing is within the exclusive control of the seller and third-party lender, consummation occurs when the consumer signs the contract.

374 F.3d at 1068 (citations omitted).[2]

---

[1] Notably, the *Cody* case was decided prior to the revision of Regulation Z in 1982.

[2] The Eleventh Circuit expressed some doubt about whether the Installment Sales Contracts should be read under Florida law to contain a condition precedent, but it declined to answer that legal question and instead assumed that such a condition precedent did exist.

REASONS FOR GRANTING THE WRIT

I. THE ELEVENTH CIRCUIT'S DISREGARD FOR FLORIDA STATE CONTRACT LAW, IN THE FACE OF STAFF COMMENTARY DETERMINING THAT THE QUESTION WHEN CONSUMMATION OF A CREDIT TRANSACTION OCCURS IS CONTROLLED BY STATE LAW, CREATES A CONFLICT WITH THIS COURT'S RULING IN *FORD MOTOR CREDIT CO. V. MILHOLLIN*, 444 U.S. 555 (1980) THAT "*UNLESS DEMONSTRABLY IRRATIONAL*, FEDERAL RESERVE BOARD STAFF OPINIONS CONSTRUING THE ACT OR REGULATION SHOULD BE *DISPOSITIVE* . . . ."[3]

The conflict between the Eleventh Circuit's opinion and this Court's precedent can be stated very simply:

> In this case, the Eleventh Circuit's statement that "although state law is determinative of when a contractual relationship is created, it has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes" is in conflict with this Court's determination in *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) that "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z. *Unless demonstrably irrational*, Federal Reserve Board staff opinions construing the Act or Regulation should be *dispositive* . . . ." (Emphasis supplied).

In *Milhollin*, this Court explained at great length the "unmistakable congressional decision to treat administrative rulemaking and interpretation under TILA as authoritative." 444 U.S. at 567-68. Relying upon express provisions of TILA and its legislative history, the Court discerned "a

---

[3] All emphasis is supplied unless otherwise noted.

decided preference for resolving interpretive issues by uniform administrative decision, rather than piecemeal through litigation" and admonished that "[c]ourts should honor that congressional choice." *Id.* at 568. The Court accordingly deferred to Official Staff interpretation of TILA's disclosure obligations in that case.

Here, the district court correctly traced the analysis that governs the timing of required TILA disclosures. That analysis leads directly to the Official Staff Commentary (Reserve Board staff opinions), and from there to Florida contract law. Under TILA, the obligation to make the required disclosures is simply "before the credit is extended." 15 U.S.C. § 1638(b)(1). This statement has been illuminated by Regulation Z, which was adopted by the Federal Reserve Board to implement TILA. 12 C.F.R. § 226. Regulation Z states that "[t]he creditor shall make disclosures before consummation of the transaction." 12 C.F.R. § 226.17. Consummation is defined by Regulation Z as follows: "Consummation means the time that a consumer becomes contractually obligated on a credit transaction." 12 C.F.R. § 226.2(a)(13). The Official Staff Commentary to that definition explains that, when determining the point at which a consumer becomes contractually obligated to a credit agreement, state law should govern. 12 C.F.R. § 226, Official Staff Commentary 2(a)(13).

With that as the analytical backdrop, the district court correctly determined:

> The Supreme Court has held that courts, like this Court, must grant great deference to the official staff commentary of Regulation Z. *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 566 (1980). The official commentary on the definition of consummation indicates that state law, not Regulation Z, determines when a consumer becomes contractually obligated. *See* 12 C.F.R. Pt. 226, Supp. 1 (Official Staff Interpretations), Commentary 2(a)(13). Florida contract law construes

> contract clauses like those in this case to create a condition precedent to contract formation. *See Huskamp Motor Co. v. Hebden*, 104 So. 2d 96, 98 (Fla. 3d DCA 1958).

245 F. Supp. 2d at 1238 (footnote omitted).

This Court's directive in *Milhollin* to adhere to staff opinions in construing TILA, and the staff's position that state contract law controls the determination of consummation, are fatally undermined if the Eleventh Circuit is correct that the state law inquiry "has nothing whatsoever to do with how the transaction is to be characterized for [TILA] purposes." *Indeed, inquiring into state law to determine when a consumer is contractually obligated on a credit transaction would be a futile exercise if it has no effect on the TILA's application to the credit transaction.*

The net effect of the Eleventh Circuit's opinion is that the Official Staff Commentary's directive that state law determines when consummation occurs is completely ineffectual. Further, the Eleventh Circuit declined to defer to the Official Staff Commentary without making the requisite determination that it was "demonstrably irrational." Nor could any such finding fairly be made. The staff's decision to rely upon state contract law in determining whether a contractual transaction has actually been consummated is patently reasonable. The Eleventh Circuit's decision thus cannot be squared with *Milhollin*, and the court's haste to supplant the staff's considered opinion about how to handle such issues with the court's own judgment about how best to protect consumers directly evokes this Court's concern that "a court that tries to chart a true course to the Act's purpose embarks upon a voyage without a compass when it disregards the agency's views." 444 U.S. at 568.

Not only is there palpable conflict between the Eleventh Circuit's opinion and this Court's decision in *Milhollin*, but the case is important to product dealers and consumers

throughout the country. As the amicus will explain more fully, a trend in this direction could threaten the practice of spot delivery altogether. Spot delivery is a practice that allows consumers to drive their new vehicles off the car lots, including at times when lenders may not be open to approve financing. Obviously, such deals are often conditional in nature. Yet, a determination that federal common law deems such transactions to obligate the consumer on a credit transaction not only undermines the Official Staff Commentary's deference to state law, but also might change the availability of such conveniences to consumers.

It remains only to note that there is no need for the Eleventh Circuit's creation of federal contract common law in this case in order to fulfill the purposes of TILA. Mr. Bragg had rights under TILA with respect to the financing that was ultimately approved, but the district court rejected Mr. Bragg's challenge to the legal sufficiency of the dealer's TILA disclosures for this transaction, and that determination is not at issue here.

With respect to the deals that did not receive financing, there is no need to impose TILA disclosure requirements prior to the approval of financing (which is the time that the contractual condition is satisfied under Florida contract law). The dealership obviously runs the risk that financing will be approved and therefore will have an incentive to make sure that all disclosures are accurate. But, to allow a TILA claim on a conditional deal that never had financing approved creates a situation where a consumer could (as in this case) bring multiple TILA claims on a deal where only one vehicle was purchased. That is at odds with common sense and with the Official Staff Commentary's deference to state law in the interpretation of when a consumer becomes obligated on a credit transaction.

In the end, to the extent that the complaint contains allegations that a dealership intentionally "yo-yos" customers by

having them sign agreements that it knows will not gain approval, that problem may be properly addressed under Florida's Deceptive and Unfair Trade Practices Act, not under TILA. Mr. Bragg's state law claims survive the dismissal of his TILA claims.

Finally, the Eleventh Circuit in this case relied upon the Fourth Circuit's decision in *Nigh v. Koons Buick Pontiac GMC, Inc.*, 319 F.3d 119 (4th Cir. 2003), which is pending before this Court as Case No. 03-377. While the Question Presented in *Nigh* is not the same as is presented by this petition,[4] both cases involve the interpretation of TILA by the circuit courts. In *Nigh*, the Fourth Circuit stated:

> a number of courts have held that consummation, or extension of credit, can encompass unfunded financing agreements. We agree with this rule because the regulation expressly refers solely to the consumer's commitment and because TILA's express purpose of protecting consumers from receiving inadequate disclosures prior to their entering into credit transactions could not otherwise be effectuated.

319 F.3d at 124.

In reaching its conclusion in this case, the Eleventh Circuit relied upon *Nigh* for the proposition that TILA liability could "encompass unfunded financing agreements." Yet, the actual holding in *Nigh* demonstrates why the Eleventh Circuit erred in reinstating Mr. Bragg's claim.

---

[4] The question presented by the certiorari petition in the *Nigh* case is: "Whether the $1,000 statutory limit originally adopted in 1968 as a cap on Truth in Lending Act (TILA) recoveries under 15 U.S.C. § 1640(a)(2)(A)(i) has been rendered inapplicable to that subpart by subsequent amendments to Section 1640(a)(2)(A)—though there is no evidence of any Congressional intent to effect such a change—so that parties who suffer no actual damages may now recover far in excess of the previous $1,000 cap."

In *Nigh*, the dealership deemed Mr. Nigh contractually obligated to a credit transaction. The dealership did not want to let him out, and he was not able to get out. The following excerpt from the *Nigh* opinion makes that clear:

> This case arose from Koons Buick's sale of a truck to Bradley Nigh. The sale was not a simple cash-for-product exchange, but involved a somewhat tortured effort by Koons Buick to provide Nigh consumer financing.
>
> * * * *
>
> Nigh left the dealership in the Blazer, on the authority of a temporary certificate of ownership issued under Va. Code § 46.2-1542. Nigh left his trade-in vehicle behind, in anticipation that a lender would purchase assignment of the payments owed under RISC I and the transaction would close. Koons Buick, however, was unable to find a willing lender. Consequently, it restructured the deal to require an additional $2,000 down payment. The dealership represented this change to Nigh as a "better deal" at a lower rate, necessitating a new RISC (RISC II). Nigh returned to the dealership on February 25 based on this representation, but told Koons Buick he did not have an additional $2,000. *He asked to return the new truck, retrieve his trade-in vehicle, and walk away from the deal. Koons Buick, however, told him he could not withdraw because it had sold his trade-in.* Nigh, unaware of this statement's falsity, and at a loss, signed RISC II and a $2,000 Promissory Note to cover the added down payment.

319 F.3d at 122.

This case, in contrast, involves a consumer who was obviously not obligated to credit terms. As the district court held, under Florida law, the documents did not obligate Mr. Bragg to any particular credit terms. Indeed, he signed two Installment Sales Contracts on September 28, 2001, but there is no allegation that he intended to obligate himself to two credit

transactions for the purchase of one vehicle or that the dealership ever contended that he had.

In this connection, it is instructive to consider the allegations in the complaint concerning Robert Crabtree, a now-dismissed plaintiff. With respect to both Mr. Crabtree and Mr. Bragg, if Bill Heard Chevrolet could not obtain financing at the rates provided for in the conditional Installment Sales Contracts they signed, then each of them had the right to (i) agree to new financing terms, reflected in new transaction documents; or (ii) to get their down payment and trade-in value back and walk away. *Although Robert Crabtree has now been dropped as a plaintiff, the record shows that the latter is exactly what happened in his case.* (Pet. App. 26a; R-38 ¶ 40.

Thus, the Eleventh Circuit has inappropriately expanded the *Nigh* holding to encompass potentially all unfunded financing agreements rather than simply those where the consumer is actually obligated to the purchase of credit. By doing so, the Eleventh Circuit has nullified the Official Staff Commentary's deference to state law and has ignored the distinction between the pre-1982 Regulation Z and the current Regulation Z.

In particular, "[U]nder the previous definition, courts were to look at the point in time that the consumer first suffered economic coercion to obtain financing. Under the new, revised definition, this coercion element is omitted, and courts should only look at the point in time that the consumer becomes *contractually obligated* on the credit transaction." *Zoumayaiwan v. Jack Haggerty Olds, Inc.*, 1985 WL 1453 (N.D. Ill. May 22, 1985).

By ignoring Florida contract law in favor of a federal common-law approach, the Eleventh Circuit has essentially returned to the previous definition of consummation, although the current definition constitutes a "significant departure"

from the outdated one. 46 Fed. Reg. 20848, 20851 (Apr. 7, 1981). In the end, in misapplying language in the *Nigh* opinion to the facts of this case, the Eleventh Circuit reached a result that was not called for by the actual holding in *Nigh*—a result that is demonstrably in conflict with this Court's decision in *Milhollin*, the Federal Reserve Board's rules, and the Official Staff Commentary interpreting those rules.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

GARY L. SASSO *
CHRIS S. COUTROULIS
D. MATTHEW ALLEN
JOSEPH H. LANG, JR.
CARLTON FIELDS, P.A.
Corporate Center Three at
International Plaza
4221 W. Boy Scout Boulevard
Tampa, Florida 33607-5736
(813) 223-7000

* Counsel of Record